IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 37 OF 1995

Somling Bhimrao Vhanmane
Age 22 years, Occ. Service
R/o. At present Kandalgaon,
Tal. South Solapur,
Dist. Solapur
(At present is in jail) ...Appellant.

Versus

The State of Maharashtra ...Respondent

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Shri. S.C. Halli, Advocate for the appellant.

Shri. A.S. Shitole, A.P.P. for State.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 6TH SEPTEMBER, 2004

ORAL JUDGMENT:-

1. Through this appeal, the appellant i.e. original accused No.1 challenges the judgment and order dated 23.12.1994 passed by the learned IV Additional Sessions Judge, Solapur in Sessions Case No. 117 of 1994. By the said judgment and order, the appellant has been convicted for the offence under Section 376 of I.P.C. and sentenced to undergo R.I. for three years.

2. It may be stated here that the appellant

alongwith two other accused was also charged for the offence under Sections 363 and 366 r.w. 34 of I.P.C., However, all the three accused came to be acquitted of the offences under Sections 363 and 366 r.w. 34 of I.P.C. No appeal has been preferred against the said acquittal.

3. Briefly stated, the prosecution case is as under:-

. The appellant i.e. original accused No.1 Somling Bhimrao Vhanmane was residing as a tenant in the house of P.W.3 Abdul Rahiman. Abdul Rahiman was a Mill labourer. At the time of the incident Abdul Rahiman was residing at Vijapur Naka Zopadpatti at Solapur. Abdul Rahiman was the father of Razia (P.W.6).

. It is the prosecution case that Razia was born on 14.1.1979. At the relevant time, Razia was studying in 9th Std. The appellant used to take Razia on his bicycle to school. 2 to 3 days prior to 25.9.94, the appellant took Razia to see the movie (film) and when they were returning back after seeing the movie, one Dilal who was a friend of Abdul Rahiman accosted them and assaulted the appellant. Dilal then went to the house of Abdul Rahiman i.e. the father of Razia and narrated the

said incident to him. Abdul Rahiman made the appellant Somling to vacate the room.

. On 25.1.94 in the morning as usual Razia went to school. Appellant also went to the school of Razia and called Razia from the school and took her in an auto rickshaw to S.T. Bus stand at Solapur. From there the appellant took Razia to Indi and then to his village Kandalgaon. Thereafter, the appellant and Razia went to Kolhapur. The appellant found employment at Kolhapur and he and Razia were living in Yadavwadi at Kolhapur as husband and wife. There he had sexual intercourse with Razia.

. On 29.1.94 Abdul Rahiman lodged a missing complaint (Exh.20). On 22.2.94 he lodged his complaint on the basis of which C.R. No. 36/94 came to be registered. Thereafter, investigation was carried out. Efforts were made to trace the appellant and Razia. On 12.8.94, P.W.15 P.S.I. Namdeo Anbhule traced the appellant and Razia and brought them from Yadavwadi in Kolhapur to Solapur. On 12.8.94 at about 11.00 p.m. P.W.7 Dr. Jalak and P.W.9 Dr. Chanchure examined Razia and appellant respectively. It was found that Razia was habituated to sexual intercourse and appellant Somling was found capable of performing sexual intercourse. After completion of investigation,

the charge sheet came to be filed.

4. The case was committed to the Court of Sessions in the usual manner. The appellant alongwith two other accused came to be charged for the offence U/sec. 363 and 366 r.w. 34 of I.P.C. The appellant was also charged for the offence U/sec. 376 of I.P.C. All the accused pleaded not guilty to the said charges and claimed to be tried. The defence of the appellant is that there was love affair between him and Razia. On 25.1.94 Razia came to him and told him that on account of movie incident, her mother beat her severely. Her mother was about to pour kerosene on Razia and set her on fire, however, she was saved by her brother and some neighbours. Hence, on 25.1.94 Razia came to the appellant and insisted that they should run away and get married. It is further the case of the appellant that 10 to 12 days prior to 12.8.94 the appellant and Razia got married at Mahalaxmi Temple at Kolhapur. As Razia was a Muslim and the appellant was a Dhangar by caste and it was not liked by her parents, hence he has been falsely implicated in this case.

5. During the trial, in all the prosecution has examined 16 witnesses. P.W.3 Abdul Rahiman Sayyed is the father of Razia, P.W.5 Sharifa Sayyed is the

mother of Razia, P.W.6 is Razia herself, P.W.7 Dr. Jalak who examined Razia, P.W.9 Dr. Chanchure who examined the appellant. P.W.10 Mohammad Jamadar and P.W.14 Mohammad Ibrahim Doka are the clerks in the school where Razia studied. P.W.16 Nazir Ahmed is a teacher in the school where Razia studied. P.W.8 Nazir Dandu was working in the Birth and Death registration section of the Municipal Corporation of Solapur. P.W.11 police Patil Raut, P.W.12 constable More, P.W.13 P.S.I. Lakade and P.W.15 P.S.I. Anbhule are the police witnesses. P.W.1 Sikandar Sanade and P.W.3 Abdul Rahiman Sayyed have deposed on the aspect of the appellant and Razia living for about five months in Yadavwadi at Kolhapur as husband and wife. On perusal of the evidence, the learned Sessions Judge acquitted the appellant as well as original accused Nos. 2 and 3 for the offences under Sections 363 and 366 r.w. 34 of I.P.C. The learned Sessions Judge came to the conclusion that Razia has sufficient understanding and she had on her own accord left her parental house and therefore, the case of kidnapping was not made out against any of the accused. However, the learned Sessions Judge came to the conclusion that though the sexual intercourse was with the consent of Razia as she was below 16 years of age at the relevant time, there is no question of her consent and hence, he

convicted the appellant under Section 376 of I.P.C. Hence, this appeal.

6. I have heard Shri. Halli, the learned advocate for the appellant and Shri. Shitole, the learned A.P.P. for the State. I have also gone through the entire evidence on record and the judgment and order of the learned Sessions Judge. In my view, the learned Sessions Judge has rightly convicted the appellant for the offence under Section 376 of I.P.C.

7. The prosecution case mainly rests on the evidence of P.W.6 Razia. The evidence of Razia shows that the appellant resided in her house as a tenant. The appellant used to leave her to her school every day on his bicycle. One day, the appellant asked Razia to go with him for a movie. While coming back from the movie, they were seen by one Dilal who was a friend of her father. Dilal took them to Razia's home and informed the parents of Razia. The father of Razia asked the appellant to vacate the room and he accordingly vacated the room. This incident happened about 2 to 3 days prior to 25.1.94. On 25.1.94 Razia went to school by auto rickshaw. The appellant came to the school of Razia and stating that her parents had called her, took her away in an auto rickshaw. The

appellant asked Razia to keep quiet and took her to S.T. bus stand at Solapur. From there they went to Indi. Then they went by truck to Bhandarkavathe. There they were halted for one night. On next day, Razia and the appellant went to Kamathi and from Kamathi they went by bus to Kandalgaon where the parents of the appellant resided. There someone informed the appellant and his parents that the parents of Razia had come. Immediately all of them rushed to a field and remained in the field for a day. On the following day the appellant and Razia went to Kolhapur by S.T. bus. They stayed there for 4 to 5 days in the house of one lady. Thereafter, the appellant got a job and Razia and appellant stayed for about 4 to 5 months in a rental room at Yadavwadi at Kolhapur. At Yadavwadi the appellant had sexual intercourse with Razia. From the evidence of this witness who is the star witness, it is clear that Razia on her own accord being fed up with the ill-treatment of her family members, approached the appellant and asked him that they should go away together and get married. Accordingly they went to Kolhapur and resided there as husband and wife.

8. The appellant and Razia resided at Yadavwadi as husband and wife. They resided in the room of one Sikandar P.W.1. At that time P.W.2 also resided

there as a tenant of P.W.1 Sikandar. Both these witnesses have stated that the appellant and Razia resided there as husband and wife.

9. From the evidence on record, it is obvious that there was a love affair between the appellant and Razia. For about five months they were living together as husband and wife at Yadavwadi at Shiroli in Kolhapur. P.W.1 Sikandar Sanade has stated that he was residing at Shiroli. There were 16 rooms in his house and he has let out one room to the appellant and Razia. As per the evidence of this witness both of them resided alone in the said room. P.W.2 Riyaz Patel has stated that he was also a tenant of P.W.1 Sikandar and he also resided at Yadavwadi in Shiroli. He has stated that the appellant and Razia were living there in the room of Sikandar for about three to three and half months. The appellant came there with Razia and resided there as husband and wife. Both these witnesses have stated that the appellant and Razia were living there as husband and wife. From the material which has been brought out in the cross examination of Razia, it is clear that on the day when she was brought back from the Cinema talkies, her mother beat her. At that time her mother brought a can of kerosene oil and a match stick. She wanted to set Razia on fire but her brother and

neighbours rescued her. On 25.1.94 at about 8.00 a.m. due to the fear of her mother she took her clothes and school bag and went to the work place of the appellant Somling at Navi Peth. There she narrated the matter to the appellant Somling and asked him that they should run away and perform marriage. At no time, during the period of 5 to 6 months that Razia resided with the appellant at Shiroli, did she make any complaint to any neighbour or any other person in respect of the appellant. It has also come on record that the appellant was working. From this it appears that most of the time Razia was alone at home. Moreover, Razia has also admitted that the place where they resided at Kolhapur had a common toilet. It is also admitted by Razia that in Yadavwadi some Muslim persons were residing and Razia being a Muslim, she could have made a complaint to them but she did not. Thus, in the period of five months there was sufficient opportunity for Razia to meet the other people and to complain against the appellant if she wanted to do so. The very fact that she did not make any complaint against the appellant and resided with him as husband and wife for about five months shows that she was residing there of her own free will and whatever happened during that period was with her consent.

10. The prosecution has also cross examined P.W.7 Dr. Jalak. This witness medically examined Razia after she was brought by the police on 12.8.94. Dr. Jalak has deposed that Razia told him that the appellant took her with him on 24.1.94 and since then she frequently had sexual intercourse with him with her consent. The fact that Razia had sexual intercourse with her consent with the appellant and she stated so to the Doctor when she was medically examined is also reflected in the medical certificate Exh.29. It would also be pertinent to note the evidence of the Investigating Officer in the present case i.e. P.S.I. Anbhule. P.S.I. Anbhule has stated that on 13.8.94 when he recorded the statement of Razia she stated that she was not ready to go to the place of her parents but she wanted to go to the house of appellant or to remand home. She was in the remand home for about 4 to 5 days. The first statement of Razia was recorded on 13.8.94 and in the said statement Razia has stated that in the Mahalaxmi Temple at Kolhapur in the presence of a Poojari she and appellant Somling exchanged garlands and their marriage was performed in the said temple by the Poojari.

11. Thus, all the evidence on record shows that there was a love affair between Razia and the appellant and she had sexual intercourse with him.

The said sexual intercourse was with the consent of Razia. The prosecution has examined P.W.8 Nazir Dandu who worked in the Birth and Death registration section of Municipal Corporation at Solapur, P.W.10 Mohd. Jamadar and P.W.14 Mohd. Doka who are the clerks in the school where Razia studied and P.W.16 a teacher in the school where Razia studied. From the evidence of these witnesses and from the evidence of father and mother of Razia as well as Razia, it is clear that Razia was below 16 years of age at the time when she was residing with the appellant. From the provisions of Section 375 of I.P.C. it is clear that a man is said to commit rape if he has sexual intercourse with a girl with or without her consent, when she is under 16 years of age. There is evidence on record which shows that Razia was below 16 years of age at the time when she was living with the appellant and the period during which the appellant had sexual intercourse with her. From all these facts, technically the offence under section 376 of I.P.C. has been proved. Thus, as such the appellant would be guilty for the offence under Section 376 of I.P.C. However, from the evidence on record, it is also clear that there was love affair between Razia and the appellant, it was Razia who instigated the appellant to take her away with him and marry her. She stayed willingly

with him as husband and wife for about five months at Kolhapur. The appellant was a young boy at that time. The learned Sessions Judge has rightly observed that Razia played an active role in the appellant and Razia going away. The learned Sessions Judge has also observed that there was love affair between the appellant and Razia. Looking to the all these facts, I am of the opinion that though the conviction under Section 376 of I.P.C. deserves to be maintained, looking to the facts and circumstances of the present case, the sentence of imprisonment deserves to be reduced to the period already undergone by the appellant.

12. Criminal appeal is partly allowed. The conviction of the appellant under section 376 of I.P.C. is confirmed, however, the sentence of imprisonment is reduced to the period already undergone by the appellant. The appellant is on bail. The bail bond shall stand cancelled.

13. Appeal is partly allowed.